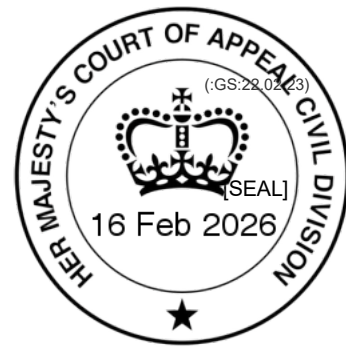




## IN THE COURT OF APPEAL, CIVIL DIVISION

REF: CA-2025-003236



### The King, on the application of

**Together Against Sizewell C Limited**

–v– **Secretary of State for Energy Security and Net Zero (Respondent)**

**Sizewell C Limited (Interested Party)**

### ORDER made by the Rt. Hon. Lord Justice Holgate

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal, against the refusal of the High Court to grant permission to apply for judicial review of the Respondent's decision dated 28 March 2025

#### Decision

- (1) Relief against sanctions is granted. Time is extended until the amended appellant's notice, grounds of appeal, skeleton argument and core and supplemental bundles respectively were in fact filed and served.
- (2) The appellant has permission to rely upon its reply and accompanying documents.
- (3) The application for permission to appeal (including the application for permission to apply for judicial review) is refused. The application is certified as totally without merit.
- (4) The application to join the Office for Nuclear Regulation is refused.
- (5) In relation to these proceedings in the Court of Appeal, any liability of the appellant for costs is capped at £10,000 and any liability of the respondent or interested party for the appellant's costs is capped at £35,000.

#### Reasons

- (1) The appellant seeks permission to appeal against the order of Mould J dated 12 December 2025 in which the judge refused to grant permission to apply for judicial review, certifying that application for permission as totally without merit. I am dealing with this application to the Court of Appeal on the basis that it appears to me that s.13(1) of the Planning and Infrastructure Act 2025 has not yet been brought into force or, in any event, does not apply to the order from which the appellant seeks to appeal. Because this is a point which goes to the jurisdiction of the Court of Appeal under s.18(1) of the Senior Courts Act 1981, any party taking a different view must notify the clerk to Holgate LJ at [Ozan.Mutlu@justice.gov.uk](mailto:Ozan.Mutlu@justice.gov.uk) and the other parties by no later than 4pm 17 February 2026.
- (2) I have considered all the papers before the court, including the Appellant's reply and accompanying documents. In my judgment all the applications and the issues they raise can properly be dealt with on the papers. An oral hearing is not required.
- (3) The proposed grounds of appeal are not arguable. They do not have a real prospect of success and there is no other compelling reason for an appeal to be heard. Likewise there is no arguable ground for bringing a application for judicial review.
- (4) The development consent order (DCO) for the Sizewell C project was made on 20 July 2022 and came into force on 11 August 2022. The DCO grants development consent under the Planning Act 2008 for the Sizewell C power station. On 30 August 2022 the appellant applied for JR of the DCO. The application for permission was refused on the papers as being unarguable. The renewed application for permission came before me at a rolled up hearing in March 2023. In a judgment handed down on 22 June 2023 I refused permission to apply for JR on all of the grounds pleaded. The appellant then sought to appeal the refusal of permission on 5 grounds. Coulson LJ ordered that 2 of those grounds be dealt with at a rolled up hearing. The Court of Appeal decided that neither of those grounds was arguable. The Supreme Court refused permission to appeal. The upshot was that none of the claim had been arguable.
- (5) It is relevant that the two grounds considered by the Court of Appeal at [2024] Env LR 22 were (1) whether the SoS had erred in law in deciding that a permanent supply of water, which was necessary for the operation of the power station, did not form part of the "project" for the purposes of the Habitats Directive and The Conservation of Habitats and Species Regulations 2017 – SI 2017 No.1012 ("the 2017 Regs") and therefore

did not have to be the subject of an appropriate assessment before the grant of the DCO and (2) if not, whether he had erred in law in failing to carry out a cumulative assessment under the 2017 Regs which included both the permanent water supply and the power station project. The CA decided that the SoS had made no error of law under either issue. The appellant will be well aware of the reasoning of that judgment without me needing to set that out in these reasons.

- (6) It is plain that the 2022 DCO did not include the overland flood barriers (“OFB”) referred to in an external hazards report by the Office for Nuclear Regulation (“ONR”) published on 26 April 2024. The legal position is that the 2022 DCO is now immune from further legal challenge (see s.118 of the 2008 Act). That immunity from legal challenge includes any argument that the decision to grant the DCO involved a breach of the 2017 Regulations (or the Habitats Directive). Accordingly the IR has a lawful consent which allows it to carry out the development authorised by the DCO, but not the OFB. It could not be suggested that the DCO is unlawful because the appropriate assessment carried out for that order did not deal with OFB.
- (7) By implication the appellant accepts this analysis given the way in which it wrote to the SoS on 6 March 2025. I note that it quoted only part of para.56 of the ONR report, omitting a most material part. The judge quoted the whole of para 56 (see judgment at [6]) and quoted the key para. of the appellant’s “conclusions” (see [7]). In summary, the appellant asserted that there was now a substantially different project from that the subject of the DCO, a project now being considered by the ONR. It claimed that the OFB represented a material change to the project (along with two other matters not raised in the application for permission to appeal).
- (8) The appellant asserted that the SoS had to make a decision on whether those changes would either (a) contravene any assimilated law (ie the 2017 Regs) or (b) amount to “exceptional circumstances” so as to enable him to exercise his power in para 3(1) of sched 6 to the 2008 Act by order to make a change to or to revoke the DCO. Although the appellant sometimes slips into language referring to a review by the SoS, it does not rely upon any part of the 2017 Regs dealing with the review of existing consents. Its case relies upon para. 3 of sched. 6 to the 2008 Act.
- (9) It is essential to read the relevant parts of the ONR report properly and as a whole. For example, para 56 simply states that the IP has committed to install OFB should climate change be worse than is reasonably foreseeable, a precise technical term employed in the risk analysis. The report did not say as the appellant asserts (para. 4 of appeal skeleton) that the IP has committed to ONR to providing OFBs. The appellant is wholly wrong to describe the OFB as a “firm proposal” and “the decided upon solution that has been committed to” (para. 51 of appeal skeleton). Instead, the OFB would ensure that water level on the site would be below the level of the platform on which the power station would stand for the period until at least 2140 *if they should be required*. This depends upon monitoring long into the future (eg. of the effect of climate change on sea level). Para.51 of the ONR report indicates that on current projections by the IP any requirement for OFB would not arise before 2120. Para.56 adds that if OFB should be required, the design would be several decades into the future when the climate change trajectory is better understood. The report states that outstanding issues may be addressed after the grant of a nuclear site licence by ONR. In fact, a nuclear site was granted by ONR in May 2024. An application by another campaign group for permission to apply for JR to challenge that licence (in relation to the handing of sea defences under the licensing regime) was refused by Lieven J in the High Court and certified as totally without merit ([2024] EWHC 3535 Admin)).
- (10) For the purposes of sched.6 to the 2008 Act, the appellant has focused on contravention of the 2017 Regs. It has not sought to make out a case of “exceptional circumstances”. The appellant has argued for an appropriate assessment under the 2017 Regs which includes the OFB.
- (11) In fact, the contravention limb of the power in sched.6 only arises where under para.3(7) the SoS is satisfied that *if the development were to be carried out in accordance with the DCO* there would be a contravention of assimilated law. The italicised words refer to the development authorised by the DCO, which in the present case is the power station project *without the OFB*. If in the future the ONR decides that OFB are required and a design is produced, the operator of the power station would need to apply to the SoS for the DCO to be changed so as to authorise the installation of the OFB. An appropriate assessment would be required under the 2017 Regs addressing the OFB as part of the development.
- (12) Although it may have been laconic, the letter dated 28 March 2025 from the Minister in response to the appellant’s letter of 6 March 2025 was essentially making these points. There is no arguable basis for criticising the Mould J’s judgment at [15]. The Minister’s references to “parameters” and “changes” are sufficient to indicate that the OFB did not form part of the project which has already been lawfully consented by the DCO. The Minister was under no obligation to provide a fully reasoned decision letter. Moreover, he was entitled to assume that he was dealing with a party relatively familiar with the IP’s scheme and the statutory regime upon which they were relying.
- (13) What appears to underlie the appellant’s present claim is a concern that if an assessment of OFB is only made if and when they should be required, it is inevitable that consent will be given for the change because the power station will have been built at great cost. This appellant also relied upon this type of argument in its earlier JR. The CA rejected it at [2024] Env.L.R 22 at [95].
- (14) As the judge rightly said, and the appellant does not seek to contradict, its claim is founded on the premise that the project now includes the OFB; the OFB are said to be clearly a fundamental part of the power station

project itself (SFG at paras. 53 and 55).

- (15) In its skeleton argument in support of its present application the appellant has flipped its ground of challenge in the JR. It begins with what were grounds 3 and 4 of the JR and are now renumbered 1 and 2. However, grounds 1 and 2 have been substantially expanded to conclude additional points. The result is something of a muddle.
- (16) **Under grounds 1 and 2 of the appeal skeleton (see SFG grounds 3 and 4)**, the appellant criticises the judge for supplying his own *post hoc* reasons to make up for a gap in the letter from the Minister dated 28 March 2025 and for in effect speculating as to what those reasons were. The appellant submits that the judge, having embarked upon that exercise, failed to apply the approach set out in the *Together against Sizewell C* decision of the CA at [2024] Env LR 595. These criticisms are misconceived. The comment in *Miller* at [61] (not [41]) about speculation was made in a substantive appeal where no reason had been given for advising the monarch to prorogue Parliament for the long period involved and the court had to decide whether that advice was lawful. Here the judge was not speculating about what had been in the mind of the Minister when sending his letter of 28 March 2025. Instead, he was simply assessing for himself, as he was entitled to do, whether the appellant's premise upon which its argument rested (see (14) above), and in relation to which it bore the burden of proof, was rational. Plainly, for the sound reasons he gave it was not.
- (17) The appellant's complaint ((appeal skeleton paras. 28 and 41) that the judge failed to apply criteria laid down by the CA in the earlier *Together Against Sizewell C* decision is hopeless. As the CA made clear, it was not seeking to prescribe a method for judging the nature and scope of a project; it identified factors *capable* of influencing such an exercise. In other words, such factors could be relevant, but the court was not saying that they were mandatory material considerations. The court said that it was not possible to lay down hard and fast rules. In some cases, such as the present one, the answer is obvious, for the straightforward reasons given by the judge.
- (18) The further criticisms in appeal skeleton paras. 36 – 41 (which go back to the original ground 3 at paras. 76-77 of the SFG) are unarguable. There was no breach of a *Tameside* duty of inquiry. Indeed, the questions posed by the appellant at para. 77 of the SFG are to do with the OFB and not with the development the subject of the DCO and any potential use of powers under sched.6 para. 3(1) and (7). As to ground 4 of the SFG, the appellant's contention that only its analysis of the scope of the project is rational is unarguable.
- (19) **Grounds 3 and 4 of the appeal skeleton (see SFG grounds 1 and 2)** This part of the skeleton is also confused. Much of it repeats points already made under appeal skeleton grounds 1 and 2, which have already been dealt with above. There is nothing arguably wrong in the judge's reasoning, eg. at [40] (relying upon the staged approach to appropriate assessment in *Together against Sizewell C* at [84]) to [45], and relying also upon the responses of the Respondent and IP to *Grune Liga* and *Dansk*. That approach complied with the precautionary principle, as the judge explained. I also accept that the OFB are an inchoate concept which is incapable of meaningful assessment for the cogent reasons which have been given. The contrary view is unarguable. Taken overall, there has been no arguable breach of reg.9 of the 2017 Regs or of Art.6(2) or art.6(3) of the Directive.
- (20) As regards the document dated 6 November 2025 attached to the appellant's reply, the appellant relies upon one short extract. This document postdates the decision challenged and there is nothing to indicate that the position set out in the ONR's report referred to by the judge has been altered because of this recent material. Indeed, the generalised nature of the text to which the appellant points is consistent with the ONR report upon which the appellant has hitherto relied.
- (21) I refuse the application for permission to appeal without needing to consider the failure to comply with time limits.
- (22) **Time limits** I should nevertheless express concern about what has happened. CPR PD 52D 17.3 is one of the provisions which indicate the enhanced need for celerity in NSIP appeals. Given the judge's TWM certificate and his refusal to extend the time limit for seeking permission to appeal from the CA, it should have been obvious that the appellant had to comply with the time limits unless it obtained an order from the CA to extend time. Once those time limits were breached, the appellant needed to apply for relief against sanctions (see *Hysaj* [2015] 1 WLR 2472). CPR 52.8, 52.12(2)(a) and (b) and 52.15 and the accompanying PD 52C are clear. The parties cannot agree to an extension of time. That is a matter for the court, although regard may be had to any agreement or non-opposition. Here there was no real need for an extension of time because of the lack of a transcript of this *ex tempore* judgment. The judgment was relatively short and much of it summarised the factual background and relevant materials in a neutral way. Taking a reasonably accurate note of the judge's views on the issues should have been possible. In any event much of the skeleton argument and grounds make submissions very similar to those before the judge. It is therefore surprising to see that the respondent and IP did not object to the extensions sought and also to see the time taken in 2026 in an effort to comply with the rules. Having said that, it is not suggested by the respondent or IP that there has been any prejudice and the *inter parte* emails in December 2025 may have given the appellant some comfort. In the circumstances I will grant relief against sanctions and the necessary time extensions.
- (23) **ONR** Given the refusal of permission there is no justification for joining the ONR as a party. I would add that if had granted permission to appeal I would have refused to join the ONR essentially for the reasons they give

along with those of the respondent and IP.

(24) **Aarhus cost cap** I impose a cost cap of £10,000 in relation to the appeal proceedings. The Government policy to which the appellant's reply refers (p 7) is not entirely clear. The policy aim is referred to but the recommendation is that CPR 52.19A should cross-refer to the CPR 46 which it already does. No information has been supplied on what view has been taken by the CPRC (whether provisional or final) and I have not been shown or found any amendment of the CPR. Dealing with the matter fairly as between all parties, the issue of whether the cap should be set at £10,000 or varied to zero, should not be decided as if the rules have already been changed in some way, when it appears that they have not. Given that the financial information as at May 2025 has not been updated, it has not been shown that a cap of £10,000 for the appeal proceedings would render the overall proceedings prohibitively expensive for the appellant. On objective unreasonableness, I bear in mind that Mould J certified the claim as TWM. Many of the arguments now raised are a repeat of what was before the High Court and where they differ they are unarguable. I consider that each of the grounds now raised is bound to fail. That reduces the weight to be given to other factors in CPR 46.27 going to objective unreasonableness. I consider that the just and proportionate outcome is that there be a cost cap of £10,000 for the costs which can be awarded against the appellant and a suitable reciprocal cap.

**Where permission has been granted, or the application adjourned, any directions to the parties (including, if appropriate, any abridgement of the 35-day time limit for filing evidence provided for in CPR 54.14)**

Signed: BY THE COURT

Date: 14 February 2026

#### Notes

- (1) Rule 52.6(1) provides that permission to appeal may be given only where –
  - a) the Court considers that the appeal would have a real prospect of success; or
  - b) there is some other compelling reason why the appeal should be heard.
- (2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.
- (3) Rule 52.8 provides that the Court of Appeal may, instead of granting permission to appeal, grant permission to apply for judicial review. Where the Court grants permission to apply for judicial review, the substantive judicial review will proceed in the Administrative Court unless the Court of Appeal directs otherwise.

Case Number: **CA-2025-003236**